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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF MICHAEL McCRAY, THE NEW YORK CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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INTEREST OF AMICI[1]

Michael McCray has been litigating the constitutionality of race-based peremptory challenges in state and federal court for nearly six years. A petition for certiorari in his case is now pending before this Court. Abrams v. McCray, No. 84-1426, 53 U.S.L.W. 3671 (March 4, 1985).[2]

On an earlier petition for certiorari in McCray's case, ___ U.S. ___, 103 S.Ct. 2438 (1983), a majority of this Court indicated for the first time its willingness to re-examine the continuing validity of Swain v.

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1. Letters of consent to the filing of this brief have been separately lodged with the Clerk of this Court pursuant to Rule 36.2.

2. McCray's motion to expedite further consideration of the petition for a writ of certiorari and consolidate his case with Batson for purposes of oral argument was denied on May 13, 1985, 53 U.S.L.W. 3807 (Brennan, Marshall and Stevens, JJ., dissenting).

Alabama, 380 U.S. 202 (1965). Shortly thereafter, McCray's case became the vehicle for the first federal opinions departing from Swain. In both the district court and the Court of Appeals, McCray obtained decisions holding that the prosecutor's use of peremptory challenges to create a racially skewed jury violates the Constitution even in the absence of evidence establishing a pattern and practice of similar actions in other prosecutions. McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1983), aff'd in part, rev'd in part, 750 F.2d 1113 (2d Cir. 1984).

By granting certiorari in Batson, this Court has necessarily called into question the correctness of those judgments and, by extension, McCray's entitlement to relief. McCray's stake in the outcome of this case is, therefore, personal and immediate. McCray's participation in this case also offers the Court another factual record

against which to judge the impact and propriety of race-based peremptory challenges.

The New York Civil Liberties Union (NYCLU) is a state affiliate of the American Civil Liberties Union (ACLU) dedicated to the preservation of individual rights. This case threatens those rights in several critical ways. First, by perpetuating the practice of racial discrimination in jury selection, race-based peremptory challenges maintain a legacy of racial stigmatization that violates the most basic premises of the equal protection clause. Second, the deliberate disqualification of potential jurors solely because of their race abridges the right of every criminal defendant to trial by an impartial jury drawn from a representative cross-section of the community.

PRELIMINARY STATEMENT

The issues presented by this case are of paramount importance to the criminal justice system. Should a prosecutor be able to use peremptory challenges to create a jury intentionally chosen along racial lines? If not, can standards be developed that will preserve the benefits of peremptory challenges, eliminate the evils of racial discrimination, and prevent further congestion in a trial calendar that is already overcrowded?

No defendant has a right to choose his own jury. On occasion, black defendants may be tried before all white juries and white defendants may be tried before all black juries. The prosecutor's purposeful use of peremptory challenges to produce that result, however, is not a benign act. It resonates

with a history of past discrimination and perpetuates a perception that blacks cannot be treated fairly in the criminal justice system. The loss of confidence that results, and the potential for verdicts based on bias, easily outweigh any benefits that accrue. In a society committed to the fair administration of justice and equal protection of the laws, it is a practice that should no longer be permitted to continue.

STATEMENT OF FACTS

Amici accept the statement of facts contained in petitioner's brief. They offer, in addition, the statement of facts in Michael McCray's case as further evidence of the practical impact of race-based peremptory challenges.

Michael McCray was arrested in New York City on charges of first and second degree

robbery on December 5, 1978. McCray is black. The only evidence ever produced against him was an identification by the crime victim, who is white.

McCray's first trial ended in a hung jury with at least two and possibly all three of the minority jurors voting to acquit. McCray's second trial ended in conviction by an all white jury. During jury selection in the second case, the prosecution exercised either eleven or twelve peremptory challenges.[3] Eight of those challenges were used to excuse the only minority members drawn for the jury: seven blacks and one hispanic. One minority juror was challenged by the prosecution despite testimony during voir dire that a close relation or friend had recently been shot during a robbery.

3. The record is ambiguous on the exact number.

After unsuccessful appeals through the state court system,[4] McCray was granted habeas corpus relief by the district court, which concluded that "the coherence of the Swain opinion depends upon. . . assumptions whose validity has been at least diluted since 1965." McCray v. Abrams, 576 F.Supp. at 1247.

The Second Circuit affirmed the constitutional principle of non-discrimination enunciated by the district court in a lengthy opinion written by Judge Kearse and joined by Judge Lumbard. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).[5] The court began its

4. People v. McCray, 104 Misc.2d 782 (Sup.Ct.Kings Co. 1980), aff'd, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982).

5. Judge Meskill dissented on the ground that Swain foreclosed McCray's claim regardless of its constitutional footing. 750 F.2d at 1135.

analysis by describing the virtually impossible task of litigants seeking to satisfy the evidentiary burden of Swain. Id. at 1120-22. Noting that the Sixth Amendment was not applied to the states until Duncan v. Louisiana, 391 U.S. 145 (1968), three years after Swain, Judge Kearse then reviewed the increasingly strong link forged by this Court between the constitutional requirement of an impartial jury and a jury drawn from a fair cross-section of the community. 750 F.2d at 1124-1128. Based on that review, the Second Circuit concluded that this Court's decisions under the Sixth Amendment demanded application of the fair cross-section requirement to the petit jury as well as the jury venire.

As Judge Kearse observed:

> No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has even been found guilty by a venire. If there is a Sixth Amendment

> requirement that the venire represent a fair cross section of the community, it must logically be because it is important that the defendant have the chance that the petit jury will be similarly constituted. The necessary implication is that the Sixth Amendment guarantees . . . that possibility.

Id. at 1128-29.

The fair cross-section requirement articulated by the Second Circuit in McCray's case does not entitle a criminal defendant to a jury that reflects the community-at-large in any proportional sense. It prohibits, however, the intentional manipulation of the jury selection process to produce a clearly imbalanced result that targets a particular group of citizens for exclusion from jury service on grounds of race or other suspect criteria. The presumption in all cases is that the jury has been constitutionally chosen. But a criminal defendant can make out a prima facie case under the Sixth

Amendment by showing the excluded jurors belong to a "cognizable group" within the community and, furthermore, that there is a "substantial likelihood" that the exclusions were based on group affiliation rather than an individual juror's ability to decide the case fairly. Id. at 1131-32.

Once a prima facie case is made out under the Second Circuit's rule, the burden shifts to the prosecution to offer some racially neutral explanation for the pattern of peremptory challenges. Id. at 1132. The prosecutor's explanation need not rise to the level of cause -- indeed, "[t]here are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would . . . make excusing him or her desirable." Id. Unless pretextual, those reasons will be accepted at face value. In the absence of any non-pretextual reason, the Second Circuit

held, the defendant is constitutionally entitled to a new jury.[6]

The Second Circuit decision rests entirely on Sixth Amendment grounds. Nevertheless, the court acknowledged that much of its reasoning applies with equal force to the Fourteenth Amendment claims rejected by Swain. Id. at 1121. Of particular relevance to any reexamination of the equal protection issue considered in Swain, the Second Circuit found, "as a practical matter," id., that blacks and other minorities are more likely than whites to suffer systematic exclusion from particular juries through the prosecutor's use of peremptory challenges.

Finally, the Second Circuit summarized

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6. In McCray's case, the Second Circuit remanded to the district court for a hearing to determine if the state could rebut the prima facie case that McCray had established. 750 F.2d at 1134-35.

its decision with the following comment:

> According to Swain . . . there is no type of case in which blacks may not be summarily eliminated on the presumption that the prosecutor is merely seeking a "fair and impartial jury." The premise of Swain and the rarity of wholesale challenges to white venirepersons thus serve only to limit artificially the opportunity of blacks for participation in our system of justice, and to perpetuate an invidious proposition of racial inferiority that has been outlawed in virtually every area of public affairs -- in employment, in education, in housing, in property rights. How unfortunate that the invidious proposition has been allowed to flourish in the administration of justice.

Id. at 1122.

On March 4, 1985, the State of New York filed a petition for a writ of certiorari from the Second Circuit decision in McCray's case. No. 84-1426, 53 U.S.L.W. 3671. That petition is still pending.

SUMMARY OF ARGUMENT

In a broad array of cases spanning more than a century, this Court has repeatedly condemned racial discrimination in jury selection, no matter what its form and no matter when in the process of jury selection the discrimination occurs. Two principles underlie these decisions. First, the fundamental notion that individuals should not be barred from participating in important civic functions, like jury duty, solely because of their race. Second, the recognition that the legitimacy of the jury as an institution is greatly diminished if it does not represent a fair cross-section of the community.

Swain forcefully affirms the propriety of these constitutional principles. It does not condone discrimination in jury selection; it rejects it in the strongest possible

language. At the same time, Swain properly acknowledges the historical pedigree and modern significance of peremptory challenges. The evidentiary standard imposed by Swain can best be understood as a pragmatic remedy developed by the Court in the hope that it would both prohibit discrimination and preserve the salutary features of the peremptory challenge. Specifically, Swain requires that a criminal defendant alleging race discrimination in the prosecutor's use of peremptory challenges demonstrate that peremptory challenges have been used in case after case within the same jurisdiction to eliminate any participation by minorities in the administration of justice.

After twenty years, it is now irrefutably clear that Swain has not accomplished its original purpose. Instead, it has encouraged a process of selecting jurors that sees race discrimination as a permissible trial tactic.

That attitude is without corollary in American constitutional law.

Not surprisingly, Swain has produced an avalanche of criticism since it was written. Within the past decade, four states and two federal circuits have modified its seemingly inflexible rule. In the best traditions of the common law, this period of experimentation has demonstrated two facts that run directly contrary to the assumptions of Swain. It is now abundantly clear that peremptory challenges can and will survive a modified rule that forbids their use for discriminatory reasons. And it is equally clear that Swain has in fact produced discriminatory results, not the evenhanded arbitrariness that the decision predicted.

This Court should not ignore those important lessons. Simply put, Swain has led to more discrimination, not less. It is inconceivable that this Court intended that

result and unconscionable to allow it to continue any longer.

ARGUMENT

THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON THE BASIS OF RACE OFFENDS BASIC NOTIONS OF EQUALITY AND DISTORTS THE REPRESENTATIVE FUNCTION OF THE JURY

This case does not present a clash of basic values. The principles of non-discrimination and representative juries that govern this case are so firmly woven into the fabric of American law that they are largely uncontested. Rather, this case represents another stage in the ongoing search for the best method to enforce those principles in actual practice.

Swain presents one remedial approach to the problem of discrimination in the criminal justice system. But like all remedial decisions, it is subject to reevaluation in

light of subsequent experience. Amici believe that Swain should be modified, not because its basic values are wrong but because its basic values are right. Unfortunately, those values have not been adequately protected by the procedures that Swain devised.

A. First Principles

For more than a century, this Court has grappled with racial discrimination in jury selection, one of the earliest forms of race discrimination in this country and one of the most persistent. And for more than a century this Court has insisted, in the strongest possible terms, that racial discrimination in jury selection is constitutionally intolerable.

Two fundamental principles emerge from the case law to explain this unwavering

judicial response. The first is derived from notions of equality and individual human dignity embodied in the Constitution, and recognizes jury discrimination for what it most surely is -- a continuing badge of racial inferiority. The second thread running through this Court's jury discrimination cases is that the jury works best when it fairly represents the community whose judgment it is empowered to deliver.

The equality principle was first articulated in Strauder v. West Virginia, 100 U.S. 303 (1880), which struck down a Jim Crow statute limiting jury service to "white male persons who are twenty-one years of age."

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an

> assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

Since Strauder, the Court has often stressed the core equal protection notion that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." Cassell v. Texas, 339 U.S. 282, 286 (1950). As explained in Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946), "[j]ury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to democratic ideals of trial by jury."

Accordingly, the Court has struck down a variety of practices over the years that have

the effect of producing racially skewed juries, regardless of whether that effect is commanded by law or achieved through trial practice. In either event, "[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society." Smith v. Texas, 311 U.S. 128, 130 (1940).

Democracy rests on a belief in individual worth -- and individual autonomy -- that cannot be reconciled with racial stereotyping. Thus, in Norris v. Alabama, 294 U.S. 587 (1935), the Court reversed a rape conviction arising from the notorious prosecution of the "Scottsboro boys" upon a showing that no black had ever served upon either a grand or petit jury in the trial county, notwithstanding the fact that this discriminatory result was not mandated by

statute. Quoting an earlier decision in Carter v. Texas, 177 U.S. 442, 447 (1900), the Norris Court said:

> Whenever by any action of a State, whether through its legislature, through its court, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him, contrary to the Fourteenth Amendment of the Constitution of the United States.

294 U.S. at 589. The Court then added that this principle of equality "is equally applicable to a similar exclusion of negroes from service on petit juries." Id.

Avery v. Georgia, 345 U.S. 559 (1953), illustrates the rigorous scrutiny applied by the Court to jury selection procedures when an allegation of discrimination is supported by the record. In Avery, prospective jurors had their names printed on tickets -- white

jurors on white tickets and black jurors on yellow tickets. The tickets were then placed in a box and a judge drew out the required number. These were given to the sheriff, who in turn handed them to the clerk, who typed up the final list of the jury panel. Although it was difficult to pinpoint at what stage in this process racial screening took place, the end result was that an all white panel of sixty jurors was selected to serve in defendant's case. The Court considered the exact moment of discrimination a constitutional irrelevancy. Id. at 562.

The Court's insistence on non-discrimination in jury selection has always rested on the recognition that a jury chosen through discriminatory procedures harms not only the accused, but "society as a whole." Rose v. Mitchell, 443 U.S. 545, 556 (1979). In Justice Blackmun's words:

It is clear from the earliest

> cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a . . . jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction.

Id. at 555.

The requirement of a jury drawn from a representative cross-section of the community similarly responds to broad social concerns. On the one hand, it undeniably enhances the capacity of the jury as a fact-finding body.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from a jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives

> the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972). See also Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

The factfinding ability of a jury may be impaired even though each of its members is sincerely impartial. This impairment is perhaps most obvious in a case like McCray's, where the prosecution's evidence rests entirely on an eyewitness identification. Studies have consistently shown that cross-racial identifications are notoriously suspect.[7] It does not require extensive citation to appreciate that the possibility

7. See E. Loftus, EYEWITNESS TESTIMONY (1979); Malpass and Kravitz, "Recognition for Faces of Own and Other Race," 31 J. Personality and Social Psychology 330 (1979).

of a white victim misidentifying a black youth on an urban street corner three weeks after a crime may be more readily understood by black jurors than white jurors.

Moreover, the process of group decision-making that is inherent in jury deliberation is necessarily diminished by the deliberate exclusion of cognizable groups. "[T]he counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." Ballew v. Georgia, 435 U.S. 223, 234 (1978).

At the same time, the fair cross-section requirement promotes important interests separate and distinct from the jury's fact-finding function. Those interests relate to the legitimacy of the jury as a social institution.

> There is good reason why public confidence in the integrity of the judiciary is diminished

> whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms.

Hobby v. United States, ___ U.S. ___, 82 L.Ed.2d 260, 271 (1984) (Marshall, J., dissenting)(footnote omitted).

Thus, almost forty years ago, in Ballard v. United States, 329 U.S. 187, 193-94 (1946), the Court refused to accept the perpetuation of all male juries in federal court although acknowledging that the presence of women on the jury "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

This point was highlighted by Congress when it adopted the Federal Jury Selection

and Service Act of 1968,[8] which adopts the fair cross-section requirement as "the policy of the United States." The House Report notes:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968), quoted in Taylor v. Louisiana, 419 U.S. 522, 529 n.7 (1975).

The fair cross-section requirement has its roots in this Court's early Fourteenth Amendment jurisprudence. See generally, Peters v. Kiff, 407 U.S. at 500 n.9. More recent cases, however, have pointed to the

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8. Pub.L. 90-274, 82 Stat. 53, 28 U.S.C. §1861.

Sixth Amendment as the source of the fair cross-section requirement. Most notably, in Taylor, the Court relied on the Sixth Amendment to support its holding "that the American concept of a jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. Accord, Williams v. Florida, 399 U.S. 78 (1970).

Swain, of course, was decided prior to the application of the Sixth Amendment's jury clause to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). Taylor was decided seven years after and it thus represents a judgment by this Court that the fair cross-section requirement is fundamental to the jury trial right protected by the Sixth Amendment. Cf. Johnson v. Louisiana, 406 U.S. 356, 373 (1972)(the Fourteenth Amendment incorporates "the essentials" of the Sixth Amendment's jury trial guarantee)(Powell, J., concurring).

As a fundamental attribute of the jury trial right, the fair cross-section requirement has never been limited by this Court to the jury venire. For example, in Ballew v. Georgia, 435 U.S. 223 (1978), this Court held that a five person jury was too small to represent the community's judgment in a meaningful way -- in part because a five person jury threatened "the representation of minority groups in the community," id. at 236 -- although there is no indication that the jury venire was in any way defective or unrepresentative.

Similarly, in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court struck down a legislative scheme that permitted the prosecution to challenge for cause any potential juror opposed to the death penalty. In Witherspoon, as in Ballew, the concern focused clearly on the jury panel rather than the jury venire. See generally McCray v.

Abrams, 750 F.2d at 1129.

That focus is plainly correct. The point of demanding a representative jury pool is to maximize the chance of obtaining a representative jury. The intentional exclusion of prospective jurors on the basis of race, whether in the process of compiling a jury pool or selecting a jury, is equally destructive of this constitutional goal. See United States v. Childress, 715 F.2d 1313, 1319 (8th Cir. 1983)(en banc), cert. denied, ___ U.S. ___, 104 S.Ct. 744 (1984)("The extension of Taylor v. Louisiana from the venire to the petit jury has much logical and practical appeal").[9]

9. Another goal of the fair cross-section requirement recognized in Taylor is to promote "public confidence in the fairness of the criminal justice system." 419 U.S. at 530. Such confidence is unlikely to be felt by a minority community which observes the systematic exclusion of every black juror through the prosecutor's use of peremptory challenges.

This does not suggest, as some lower courts have erroneously assumed,[10] that the jury chosen in any particular case must faithfully duplicate the ethnic composition of the community at large. "Defendants are not entitled to a jury of any particular composition . . . ." Taylor v. Louisiana, 419 U.S. at 538. But the constitutional imperative of an impartial jury drawn from a fair cross-section of the community that Taylor endorsed is undeniably frustrated by the prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race alone.

"When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right

10. Cf. People v. Payne, 457 N.E.2d 1202, 1203-04 (Ill. 1983).

guaranteed in Taylor is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." Harris v. Texas, ___ U.S. ___, 82 L.Ed.2d 858 (1984)(Marshall, J., dissenting from the denial of certiorari). As one commentator has aptly observed: "Random unrepresentativeness . . . is certainly different from the intentional destruction of representativeness." Comment, The Prohibition of Group-Based Stereotypes in Jury Selection Procedures, 25 Vill.L.Rev. 339, 356 (1979).

In his first inaugural address, Thomas Jefferson listed "trial by juries impartially selected" as one of the defining liberties of American life. This Court has upheld that right over and over again for one hundred years. See Ex Parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Bush v. Kentucky, 107 U.S. 110

(1883): Rogers v. Alabama, 192 U.S. 226 (1904): Hollins v. Oklahoma, 295 U.S. 394 (1935): Hale v. Kentucky, 303 U.S. 613 (1938): Pierre v. Louisiana; 306 U.S. 354 (1939): Hill v. Texas, 316 U.S. 400 (1942): Thiel v. Southern Pacific Co., 328 U.S. 217 (1946): Patton v. Mississippi, 332 U.S. 463 (1947): Hernandez v. Texas, 347 U.S. 475 (1954): Whitus v. Georgia, 385 U.S. 545 (1967): Carter v. Jury Commission, 396 U.S. 320 (1970): Turner v. Fouche, 396 U.S. 346 (1970): Alexander v. Louisiana, 405 U.S. 625 (1972): Peters v. Kiff, 407 U.S. 493 (1972): Castaneda v. Partida, 430 U.S. 482 (1977).

Occasionally, the Court has relied on concepts of equality; occasionally, it has cited the representative function of the jury. On the issue of ultimate principle, however, the Court has never wavered. "If there has been discrimination [in jury selection], whether accomplished ingeniously

or ingenuously, the conviction cannot stand." Smith v. Texas, 311 U.S. at 132.

B. The Premises of Swain

Swain emphatically rejects the constitutionality of race discrimination and thus, on its face, is fully consistent with the judicial tradition recited above. As Swain properly notes, "the soundness of these principles . . . is unquestioned . . . ." 380 U.S. at 205. "[A] State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," id. at 203-04, and after Taylor, such purposeful exclusions violate the Sixth Amendment as well.

Nevertheless, Swain holds that a prosecutor's use of peremptory challenges in a particular case is immune from constitutional inquiry no matter how egregious, 380 U.S. at

222. To prevail under Swain, a defendant must introduce statistical evidence establishing a pattern and practice of racial exclusions in a given jurisdiction over a period of time. Swain does not define a precise quantum of evidence necessary to make out a prima facie case. But lower courts faced with that problem have understandably reacted to the fact that in Swain itself six members of this Court found the evidence lacking despite proof that no black had ever served on a grand or petit jury in the history of Talledega County.

The approach adopted by Swain differs dramatically from the normal rule in discrimination cases. For example, this Court has never held that an employee must use statistics in order to prove job discrimination. Nor has this Court ever held that statistics are an indispensable ingredient in housing discrimination cases. Discrimination

may be triggered by group membership, but the right to be free of discrimination is an individual right. Thus, "[T]he Fourteenth Amendment requires that equal protection to all must be given -- not merely promised." Smith v. Texas, 311 U.S. at 130.

Swain sidesteps this injunction by holding that the disqualification of blacks from criminal juries on racial grounds is not discrimination; rather, Swain defines such action as the permissible consequence of an admittedly arbitrary system designed in the end to secure impartial juries and promote public confidence in the jury system. Elaborating on this point, Swain explains that peremptory challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S. at

220.

It is, at best, an odd definition of discrimination that does not include the purposeful exclusion of otherwise qualified individuals from jury service solely because of their race. Clearly, a practice does not become more or less discriminatory because it is longstanding. And the fact that potential jurors are subject to peremptory challenge because of their occupation or organizational affiliation is simply not equivalent in constitutional terms to the disqualification of jurors on the basis of race.

As a society we have made the profound choice not to divide the world along certain lines. The use of race as a criterion for jury selection is no less discriminatory because it is accomplished through the exercise of peremptory challenges than through some other manipulation of the jury selection procedure.

According to Swain, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." Id. at 221. But if blacks, whites, Protestants and Catholics are all being struck from the jury in a seemingly random and arbitrary pattern, there is no valid claim of discrimination. Conversely, if only blacks or only whites or only Protestants or only Catholics are being struck as a group, then there are at the least legitimate grounds for further inquiry.

Amici concede that in a given case, a potential juror's race or religion may give rise to a more searching voir dire. And it is equally true that the right to disqualify a juror whose racial bias is "felt" even though it cannot be proved is an important right. Compare Ham v. South Carolina, 409 U.S. 524 (1973), with Ristaino v. Ross, 424

U.S. 589 (1976). But when juror after juror is excused by the state in a particular case, not because of any actual or perceived bias related to the specific case but because of an automatic assumption that black jurors will not fairly judge a black defendant no matter what, then a constitutional line has been crossed from merely arbitrary state action to forbidden discrimination.

Swain does not deny that the racial use of peremptory challenges can severely distort the representative quality of a particular jury in a way that American society and constitutional jurisprudence now refuse to tolerate in almost every other context. Rather, Swain suggests that race may be a relevant factor in selecting an impartial jury, and that the selection of an impartial jury is a higher value than non-discrimination in the criminal justice system. Taylor, however, emphatically

rejects the use of the racial and sexual stereotypes in jury selection.

Race qua race is not a relevant criterion in selecting an impartial jury. At best, it offers a rough approximation of more relevant criteria, such as background and experience. "[T]he Constitution recognizes higher values than speed and efficiency," however. Stanley v. Illinois, 405 U.S. 645, 656 (1972). As this Court stated in Taylor, "the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." 419 U.S. at 535.

To exclude all black jurors because some black jurors may be affected by racial sympathies is not fundamentally different than excluding all women from certain occupations because some women may not be strong enough to perform the job. Indeed, it

is even worse since the quality of most jobs presumably does not depend on whether they are performed by a man or a woman. A jury, on the other hand, cannot perform its community function if it is purposefully stripped of its representative character.

Swain's assumption that whites as well as blacks are the potential victims of this discrimination hardly validates the practice. Moreover, as the Second Circuit correctly recognized in McCray v. Abrams, 750 F.2d at 1121, "[i]n most communities a majority of those eligible for jury duty are white; and as a practical matter, the prosecution does not peremptorily excuse whites simply because they are whites."

There is no doubt that peremptory challenges play a valuable role in assuring fairness in the trial process. There is also no doubt that the decision in Swain was prompted by a strong desire to preserve the

peremptory challenge system. There is absolutely no indication in Swain, however, that a majority of this Court meant to condone racial discrimination in jury selection or anticipated that Swain would, in fact, encourage such discrimination. Nor is there any reason for this Court to adhere to a rule that promotes discrimination when other alternatives exist that are equally capable of preserving the beneficial features of peremptory challenges without running the risk of discriminatory abuse that Swain entails.

C. The Impact of Swain

Swain would not be subject to the criticism it has engendered if its evidentiary standard had proved an effective device for rooting out discrimination in jury selection. After two decades, however, it is abundantly clear that Swain created instead a "mission impossible" for criminal defendants

who allege discrimination in the prosecutor's use of peremptory challenges. McCray v. Abrams, 750 F.2d at 1120. The result has been to breed cynicism rather than respect for the criminal justice system.

McCray's impossible plight in seeking to satisfy Swain is fairly typical. There are no available statistics that document the pattern of peremptory challenges by the Kings County prosecutor. Thus, to meet the Swain test, McCray would have to transcribe enough voir dire proceedings to create a statistically significant sample, assuming that a significant number of voir dires are even recorded.[11] The time and expense involved in that undertaking are evident. Even then, there is no assurance that the transcripts

11. Many voir dires, including McCray's, are conducted without a stenographer present.

would be helpful since the race of prospective jurors is often not revealed during voir dire. Furthermore, all of this discovery must be accomplished virtually overnight since its need does not arise until a defendant's own jury selection is already underway.[12] Most fundamentally, Swain offers no possibility of relief to the first victim of discriminatory jury selection in a jurisdiction. Cf. Oklahoma City v. Tuttle, 53 U.S.L.W. 4639, 4645 (1985)(Brennan J., concurring)("A §1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it

12. The complexity of the statistical case required by Swain is fully described in Winick, "Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis," 81 Mich.L.Rev. 1, 21-39 (1982).

is for the second and subsequent victims").

These difficulties have proved largely insurmountable. According to one published report, not a single defendant was able to satisfy Swain in the decade following the Supreme Court's decision. Annot., "Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race," 79 A.L.R.3d 14, 24 (1975). Amici has discovered only two cases in which Swain's evidentiary burden has ever been met. See State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162 (La. 1979).[13]

13. In United States v. Newman, 549 F.2d 240 (2d Cir. 1977), the Second Circuit reversed a statistical finding that the pattern of peremptory challenges by the United States Attorney in the District of Connecticut had reached "an excessive point." Judge Anderson's opinion disagreed with the methodology used by the district court.

This judicial phenomenon can be explained in only two ways. Either peremptory challenges are not being used to screen potential jurors on the basis of race or Swain inadvertently condoned a discriminatory practice it meant to condemn. The evidence strongly supports the latter interpretation. See generally J. Van Dyke, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977).

In dissenting from the original denial of certiorari in McCray's case, Justice Marshall offered a catalogue of cases in which Swain had proved an insurmountable barrier "despite proof that unmistakably creates an inference of racial discrimination." 103 S.Ct. at 2441 n.4.

For example, in United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976), the evidence showed that 81% of all blacks available to serve on petit

juries in 15 criminal cases tried during 1974 had been excluded by the prosecutor's peremptory challenges, and that the prosecutor had excluded all potential black jurors in seven of those cases. Defendant's claim under Swain was nonetheless denied and the prosecutor was never required to justify his conduct in non-racial terms.

One year later, in United States v. Nelson, 529 F.2d 40 (8th Cir. 1976), another defendant in the same jurisdiction again established that the prosecutor had used his peremptory challenges to bar all blacks in his case. This time the court expressed "concern" about the prosecutor's actions but was unwilling to grant defendant a new trial. Instead, the prosecutor was warned that in future cases "appropriate action" might be taken by district judges in the exercise of their supervisory powers. 529 F.2d at 43.

The evidence of discriminatory intent

was even more direct in United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971). There, the prosecutor's own notes recorded the race of defendants he had tried during a one week period, the number of blacks on the jury panel and the number of blacks excluded through the prosecutor's peremptory challenges. Based on this record, the court accepted defendant's "reasonable conclusion" that the prosecutor was engaged in a deliberate effort to exclude as many black jurors as possible whenever the defendant was black. Still, the court held, this showing did not suffice under Swain.

Indeed, Swain motions are routinely denied even when statistical proof is reinforced by anecdotal evidence. In Ridley v. State, 475 S.W.2d 769 (Tex.Crim.App. 1972), the prosecutor used seven peremptory challenges to exclude potential black jurors. To buttress his claim under Swain, defendant

presented testimony from local attorneys that documented the prosecutor's systematic use of peremptory challenges to create all white juries in cases involving black defendants and white victims. Defendant also produced an admission from an assistant district attorney that peremptory challenges were regularly used in this discriminatory manner. Yet his claim under Swain was denied by the court. See also Harris v. Texas, ___ U.S. ___, 82 L.Ed.2d 858, 859 (1984)(Marshall, J., dissenting from the denial of certiorari).

Given the inherently arbitrary nature of peremptory challenges, no constitutional rule can eliminate entirely the potential for abuse by a prosecutor intent on purging the jury in a discriminatory fashion. But Swain leaves concerned trial judges with no remedy to eradicate discrimination in their courtrooms. See e.g. People v. Thompson, 79

A.D.2d 87, 435 N.Y.S.2d 739, 743 (2d Dept. 1981).

The difficulties with the Swain approach, and the results it produces, have been apparent for some time. From the beginning, Swain has been strongly criticized by most legal commentators.[14] In recent years it has been rejected by four different states in construing their own constitutions. People v. Wheeler, 22 Cal.3d 258, 583 P.2d

14. E.g. Winick, supra n.12; Brown, McGuire & Winters, "The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse," 14 New Eng.L.Rev. 192 (1978); Comment, "The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 U.Cin.L.Rev. 554 (1977); Note, "Limiting the Peremptory Challenge: Representation of Groups on Petit Juries," 86 Yale L.J. 1715 (1977). Other critical commentary is cited in Justice Marshall's dissenting opinion in McCray's case. 103 S.Ct. at 2439 n.1.

748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); State v. Neil, 457 So.2d 481 (Fla. 1984).

In addition, two federal circuits have now distinguished Swain. In McCray, the Second Circuit relied exclusively on the Sixth Amendment to "conclude that a defendant may appropriately subject to scrutiny . . . the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case." 750 F.2d at 1131. In United States v. Leslie, No. 83-3719, ___ F.2d ___ (5th Cir. April 10, 1985), the Fifth Circuit cited its supervisory authority to prohibit federal prosecutors within its jurisdiction from exercising peremptory challenges on the basis of race.

While not departing from Swain, the Ninth Circuit has strived to circumscribe the

effect of Swain, ruling in Weathersby v. Morris, 708 F.2d 1493, 1496 (9th Cir. 1983), that "a court need not blind itself to the obvious . . . ." when a prosecutor admits utilizing peremptory challenges on the basis of race. The Eighth Circuit has questioned Swain in the process of following it. United States v. Childress, 715 F.2d 1313 (8th Cir. 1983)(en banc), cert. denied, 104 S.Ct. 744 (1984).

All of this scholarly and judicial analysis has done more than just reveal the flaws of Swain. It has demonstrated in the crucible of actual criminal trials that an alternative to Swain is both feasible and fair. It has done so, moreover, without losing sight of Swain's dual goals -- eliminating racial discrimination in the criminal justice system and preserving the value of peremptory challenges as a method of juror disqualification separate and distinct

from challenges for cause.

In Bell v. Hood, 327 U.S. 678, 684 & n.6 (1946), this Court wrote: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." To grant the necessary relief when peremptory challenges are used by the prosecution for discriminatory purposes, the rule in Swain must now be modified.

D. An Alternative to Swain

As previously mentioned, Swain has now been modified by four states and two federal circuits. United States v. Leslie, supra; McCray v. Abrams, supra; State v. Neil, supra; State v. Crespin, supra; Commonwealth v. Soares, supra; People v. Wheeler, supra. In all these instances, the modification of Swain has been essentially the same.

Under the so-called Wheeler rule first announced by the California Supreme Court, the exercise of peremptory challenges in any given case is presumed to be valid. But unlike Swain, that presumption can be rebutted by a showing that prospective jurors are being challenged "because of their group association rather than because of any specific bias." 22 Cal.3d at 280. Among the relevant factors identified by Wheeler in making that showing are whether all or most of an identifiable group have been excluded from jury service, whether a disproportionate number of peremptories have been used against a specific group and whether members of that group have been excused with little or no questioning. If a prima facie case is made, the burden shifts and the prosecutor must offer some reason for the peremptory challenges other than group bias. The burden is a minimal one, however, and "need not rise to

the level of a challenge for cause." 22 Cal.3d at 281-82.[15]

This analytic model is a familiar one in discrimination law, e.g. McDonnell Douglas v. Green, 411 U.S. 792 (1973), and it has been applied by this Court in jury discrimination cases following Swain. See Castaneda v. Partida, 430 U.S. 482, 494 (1977); Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

The elements of a prima facie case in the peremptory challenge context are illustrated by the facts of McCray. The only

15. The Second Circuit adopted a roughly equivalent rule in McCray, holding that a defendant can establish a prima facie case by showing, first, that the group allegedly excluded from jury service is a "cognizable group in the community," 750 F.2d at 1131-32, and second, a "substantial likelihood" that the challenged exclusions were based on group membership rather than individual biases. Id.

eight minorities in the jury pool were challenged peremptorily by the prosecution; no minorities were eliminated by the defense, either through peremptory challenges or challenges for cause. Moreover, as McCray's counsel pointed out in a timely objection, there was no discernible reason for several of the peremptory challenges. To the contrary, at least one minority juror was excused despite indications during voir dire that he was likely to be sympathetic to the prosecution. And significantly, this pattern of peremptory challenges came on the heels of a hung jury, whose minority members had voted for acquittal.

Based on the record in McCray's case, neither the district court nor the Second Circuit had any difficulty concluding that "McCray's showing was ample to shift the burden of coming forward with some reason other than group affiliation for the

challenges." 750 F.2d at 1133. Once the burden shifts, the prosecution's explanation "of its legitimate reasons must be clear and reasonably specific." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). "[A] simple protestation . . . that racial considerations played no part in the selection would [not] be enough." Castaneda v. Partida, 430 U.S. at 498 n.19 (and cases cited therein).[16]

The reported decisions from California and elsewhere do not reveal any disruption in the system of peremptory challenges as a result of the Wheeler rule. Indeed, in the

16. The unwillingness to accept "a simple protestation" of innocence in jury discrimination cases suggests a shift in the burden of persuasion as well as the burden of production. This is entirely appropriate. Otherwise, a prosecutor's pretextual explanation would almost always prevail, since under the Wheeler/McCray scheme, the criminal defendant has neither the advantage of discovery nor the opportunity for rebuttal. Compare Burdine, 450 U.S. at 258.

seven years since Wheeler was decided, the issue seems to have reached the California appellate courts in fewer than a dozen cases.

The paucity of appellate decisions is not surprising. Most prosecutors will comply with their legal obligation to exercise peremptory challenges in a racially neutral way once those obligations are clarified. For those few prosecutors who do overstep proper bounds, the constitutional remedy will generally occur at the trial court level and involve little more than a new beginning to jury selection. Obviously, there are transactional costs whenever jury selection is interrupted. But those costs are relatively small and cannot be compared with the constitutional injury inflicted by a discriminatory jury selection. See Taylor v. Louisiana, 419 U.S. at 535 ("the administrative convenience in dealing with women as a class is insufficient justification for

diluting the quality of community judgment represented by the jury in criminal trials").

Thus, the California Supreme Court recently found that Wheeler had been both effective and workable. People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 859 & n.11 (1983). Reinforcing that view, the prosecutor in McCray has asserted that a Wheeler-type rule could be implemented in New York without significant disruption in the criminal justice system. Her views in this regard, as the district attorney of New York's most populous county, are entitled to respect.

Any deviation from the bright line of Swain undoubtedly raises certain line-drawing problems. See McCray v. New York, 103 S.Ct. at 2439 n.* (Stevens, J., concurring in the denial of certiorari). However, the clarity of Swain derives from the fact that it is unwilling to question the use of peremptory challenges in a given case no matter how

apparent the prosecutor's discriminatory actions may be. Wheeler and its progeny, including McCray, amply demonstrate that such judicial passivity in the face of racial discrimination is both unnecessary and unwise.

Nor should this Court be deterred by the claim that a modification of Swain will present insuperable problems in classifying groups as sufficiently cognizable or not to trigger the fair cross-section requirement. Similar objections were considered and dismissed in Hernandez v. Texas, 347 U.S. 475 (1954), which held that persons of Mexican descent could not be systematically excluded from Texas criminal juries.

Hernandez ends with the following justification of its conclusion:

> To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component

> ethnic groups of the community on every jury ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced. His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded -- juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

347 U.S. at 482 (footnotes omitted).

The Constitution requires as much in the present case. Whatever subtleties may remain to be resolved in future cases, our constitutional heritage cannot be reconciled with a rule of law that permits a public prosecutor to bar potential jurors from performing one of democracy's most sacred functions solely on account of their race. With twenty years experience, Swain's flaws are too apparent to be further ignored. Its

remedial approach to the problems of discrimination in peremptory challenges must now be modified in order to uphold the principles of racial equality that Swain itself so eloquently affirms.

CONCLUSION

Two years ago, three members of this Court suggested that the issues presented by this case should be further examined in the laboratory presented by the lower state and federal courts. As part of that experiment, and one of a growing number of courts departing from Swain, the Fifth Circuit recently wrote: "Ugly in its practice and insidious in its effect, invidious racial discrimination deserves protection in no area of society, least of all in the administration of justice in the federal courts." United States v. Leslie, supra, slip op. at 3955.

Amici concur in that judgment. The use of race-based peremptory challenges has simply become an expedient way to accomplish indirectly what can no longer be achieved

through the direct and open exclusion of minority group members from the criminal justice system. In a multitude of other contexts, this Court has forbidden such end runs around the Constitution. Likewise in this case, the anomalous loophole that Swain produced should finally be closed.

For the reasons stated herein, amici urge reversal of the decision below.

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